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No. 218

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In the Supreme Court of the United States

OCTOBER TERM, 1937

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned respectfully petitions this Honorable Court for leave to file a brief as amicus curiae in the above-entitled suit. The Solicitor General and counsel for the petitioner have assented in writing, as indicated by letters filed with the Clerk of this Court.

This application is made by the undersigned as counsel for the petitioner in the case of *Bates Manufacturing Co.* v. *United States,* now pending before this Court on a petition for a writ of certiorari, October Term, 1937, No. 647.

Respectfully submitted,

CHARLES B. RUGG

January 3, 1937

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed in behalf of Bates Manufacturing Company. That company is plaintiff in a suit to recover alleged over-payments of income and profits taxes, now pending before this Court on a petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, October Term, 1937, No. 647.

In that case, the United States District Court for the District of Massachusetts granted a motion by the Government to dismiss the taxpayer's petition on the ground that the cause of action was barred by the statute of limitations. *Bates Manu-*

facturing Company v. *United States,* 19 F. Supp. 526. On December 8, 1937, the Circuit Court of Appeals (one judge dissenting) affirmed the judgment of the District Court. The taxpayer, on December 24, 1937, filed in this Court its petition for a writ of certiorari.

The question involved in that case is whether a suit against the United States under Section 24 (20) of the Judicial Code (*infra,* p. 30) is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, (*infra,* p. 30) when a petition is filed in the District Court pursuant to Section 5 of the Tucker Act (*infra,* p. 31), or not until a copy of the petition so filed is served upon the United States Attorney pursuant to Section 6 of the Tucker Act (*infra,* p. 31). The taxpayer there duly filed its petition in the District Court, pursuant to Section 5 of the Act, one day prior to the expiration of the period of limitations provided by Section 3226, as amended. Copies of the petition were served on the United States Attorney and mailed to the Attorney General, pursuant to Section 6 of the Act, three days after the close of the limitation period.

In the instant case, the question is whether a suit against the United States under Section 24 (20) of the Judicial Code is brought within the period allowed by the applicable statute of limitations when a summons is issued and served, in accordance with local practice, there having been no compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within that period. Or, stated in more general terms, the question is whether, by virtue of the Conformity

Act (U.S.C. Title 28, Section 724), suits against the Government may be instituted in accordance with the rules of practice and procedure prevailing in the state in which the district court is held. Since in the instant case a petition was not filed, pursuant to Section 5 of the Tucker Act, nor served, pursuant to Section 6 of that Act, within the limitation period, it was not necessary for the court below, and will not, we submit, be necessary for this Court, to decide the question raised in the *Bates Manufacturing Company* case—i.e. whether service of a copy of the petition, in addition to filing the petition, is essential to the beginning of a suit. For, if it be held that the Conformity Act is inapplicable to suits against the United States, that will dispose of the case without more. And, on the other hand, if it be held that the Conformity Act applies to such suits, that also will dispose of the case since, under the law of New York, an action is commenced when a summons is delivered to an officer for service. See *United States* v. *Northern Finance Corp.*, 16 F. (2d) 998 (C.C.A. 2d).

Nevertheless, the court below, after concluding that local practice could not be followed in a suit against the United States, and that the running of the statute of limitations was not stopped by service of a summons, which was decisive of that branch of the case, proceeded to make the following statement (89 F.(2d) 614, 616):

> "As an original question, we should entertain no doubt that . . . the suit cannot be deemed to have been 'brought' until, at the least, a copy of the petition was served on the district attorney".

It seems evident that the question as to the point at which suit is to be deemed "begun" when the procedure prescribed by the Tucker Act is followed exclusively was not necessary to the disposition of the instant case and that the statement quoted above must be regarded as dictum. The Government, however, in support of its contention that service of the summons did not begin the suit, has advanced the affirmative argument that "at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period". (Brief in Opposition, p. 6.) Thus the precise question involved in the *Bates Manufacturing Company* case has seemingly been injected into the instant case.

That question, we submit, is of sufficient importance and complexity to warrant careful consideration. There appears to be no occasion for an exhaustive discussion of it by either of the parties to the present controversy, nor do we conceive that this Court will find it necessary to pass upon it. But inasmuch as the *Bates* case, in which the question is squarely presented, is now pending before this Court on a petition for a writ of certiorari, and since the question has been adverted to in the instant case by the court below and by the Government, we deem it proper to indicate what we regard as the correct approach to the problem. It is our contention that service of a copy of the petition is not essential to the commencement of the suit, and we shall confine our discussion to that issue.

SUMMARY OF ARGUMENT

1. The question to be determined is the construction of the words "begun", "brought" or "commenced" as those terms are used in the applicable statute of limitations. The statutes of limitations themselves do not contain a definition of these terms. Nor does the Tucker Act, prescribing the procedure to be followed in suing the United States in the district courts, expressly state what point in that procedure marks the beginning of the suit. The intention of Congress must, therefore, be determined by recourse to established principles of statutory interpretation. Words are to be given their ordinary meaning unless it is clear that they are intended to have some different significance. In common parlance, the words "begin" and "commence" mean to enter upon, or take the first step in, a course of action. The first step in bringing a suit under the Tucker Act, is the filing of the petition. Service of a copy of the petition so filed is a subsequent step, prescribed by a subsequent section. Taking the language of the applicable statute of limitations in its ordinary sense, and applying it to the procedure defined in the Tucker Act, the filing of the petition marks the beginning of the suit.

2. Other relevant principles of interpretation are that all Acts of Congress must be read in the light of the common law, and that language having a meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. The settled common law rule, both in England and this country, is that an action at law

is "brought" or "begun", within the meaning of the statute of limitations, when the judicial machinery is set in motion—that is, in most jurisdictions, when a writ or summons is issued with an honest intention to prosecute the suit diligently. In equity, where the procedure is more closely analagous to the procedure under the Tucker Act, the suit is commenced when the bill or petition is filed, provided there is no unreasonable delay in the service of the subpoena. Thus in the judicially accepted sense, as well as in common parlance, an action or suit is begun when the first formal step required by the applicable procedure is taken. There is no reason to suppose that in enacting Section 3226 of the Revised Statutes Congress intended to adopt a different rule. This view is further supported by the fact that suit in the Court of Claims under the Tucker Act is "brought" when the petition is filed. There is no apparent reason why Congress should desire the statute of limitations to operate differently depending on the court in which suit is instituted.

3. The rule that, when the United States consents to be sued, the conditions of such consent must be strictly observed is of no assistance in determining what constitutes beginning of the suit. The question is not whether there must be compliance with all the provisions of the Tucker Act, but whether there must be such compliance prior to the expiration of the period of limitations. If the argument as to strict compliance is sound, it logically follows that, before the suit may be regarded as begun, the plaintiff must not only have served the United States Attorney but also mailed a copy of

the petition to the Attorney General and filed an affidavit of such service and mailing. No court has so held. In each case in which the provisions as to mailing a copy of the petition to the Attorney General and filing an affidavit have been in issue, it has been held that those provisions are not jurisdictional and may be complied with or waived after the suit has been instituted.

4. The question is not settled by authority. The courts have tended to confuse the question whether the Conformity Act permits the adoption of local practice in suits against the United States, notwithstanding the provisions of the Tucker Act, with the question whether, if the procedure outlined in the Tucker Act is followed, there must be service in addition to filing the petition within the statutory period. The cases in which the latter question was actually raised for decision are few in number and are based on inconsistent theories and rely on authorities dealing with other issues.

ARGUMENT

I

THE STATUTES IN QUESTION DO NOT EXPRESSLY DEFINE THE BEGINNING OR COMMENCEMENT OF A SUIT UNDER THE TUCKER ACT IN THE DISTRICT COURT, BUT IT IS LOGICALLY TO BE INFERRED FROM THEIR TERMS THAT THE SUIT IS BEGUN WHEN A PETITION IS FILED.

Section 19 of the World War Veterans' Act of 1924 (U.S.C. Title 38, Sec. 445) requires that suits under that section be "brought" within a specified time. Section 3226 of the Revised Statutes, applying to suits for the refund of taxes, provides that such suits must be "begun" within two years after the disallowance of the claim for refund. Other statutes of limitations use the word "commenced". It is clear that all these words have the same meaning. *Goldenberg* v. *Murphy,* 108 U.S. 162, 163. The question in each case is what constitutes the bringing, beginning or commencement of a suit within the meaning of such statutes. It is the statute of limitations which is to be construed.

Those statutes do not contain definitions of their terms. No guidance can be had from them as to what is meant by the bringing, beginning or commencement of a suit. Accordingly we must turn to the statutes having to do with the procedure for bringing suits against the United States to see whether they define at what point in that procedure the suit is to be deemed begun, brought or commenced. If they do, that point marks the institution of the suit for the purposes of the statutes of limitations.

The jurisdiction of the district courts in respect of actions against the United States is defined in

Section 24 (20) of the Judicial Code (*infra,* p. 30). This section, however, does not specify the procedure for bringing or prosecuting such actions. The procedure is set out in Sections 5 and 6 of the Tucker Act (*infra,* p. 31).

Section 5 of that Act provides that "in any suit brought" under the jurisdictional provisions now embodied in Section 24 (20) of the Judicial Code (formerly Section 2 of the Tucker Act) the plaintiff shall file a duly verified petition setting forth the nature of his claim and other specified information. Section 6 provides that the plaintiff shall (1) cause a copy of such petition to be served on the district attorney of the United States in the district wherein suit is brought, (2) mail a copy of the petition to the Attorney General by registered mail, and (3) thereupon file an affidavit of such service and mailing. These sections do not state which, if any, of the prescribed acts marks the beginning of the suit. They do not purport to mark the point at which a suit in accordance with that procedure is to be deemed instituted for purposes of the statutes of limitations or for any other purposes. They are wholly silent on the question. See *Walton* v. *United States,* 73 F. (2d) 15, 17 (C.C.A. 8th); *Spencer* v. *United States,* 14 F. Supp. 46, 47 (D. Mass.); cf. *Creasy* v. *United States,* 4 F. Supp. 175, 179 (W.D.Va.).

Since the procedural statute does not expressly define the beginning or commencement of a suit against the United States, we must seek the intention of Congress by application of the rules of statutory interpretation. It is to be borne in mind that the ultimate question is as to the meaning of

the words "brought", "begun" or "commenced" as used in the applicable statutes of limitations..

It is well settled that words used in a statute are to be given their ordinary or popular meaning unless the statute clearly indicates that they are intended to have some different signification. *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 370; *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 327. The words "begin" and "commence", in common parlance, mean to take the first step in, perform the first act of, or enter upon. See *Webster's New International Dictionary* (2d Edition). It is to be assumed, unless the contrary is clearly shown, that Congress used them in that sense. What, then, is the first act or step in suing the United States under the Tucker Act? When may the claimant be said to have entered upon his suit?

If the procedure specified in Sections 5 and 6 of the Tucker Act is followed (passing the question whether that is the only permissible procedure), clearly the first act or step taken is the filing of the petition. Upon the filing of the petition the case is docketed in court, and the nature of the claim becomes a matter of public record. The proceedings have been entered upon in a formal and open manner. In common parlance, the suit has been "commenced" or "begun". See *Burton* v. *Buckeye Ins. Co.*, 26 Ohio St. 467, 469.

Notice to the defendant by serving a copy of the petition on the United States Attorney and mailing a copy to the Attorney General is the second step in the proceedings. As we have pointed out, the Tucker Act does not expressly provide that the suit is not begun until these later steps are

taken. Nor can such a requirement be implied from its terms. The provisions for service, mailing and filing an affidavit thereof are contained in a separate and subsequent section from those having to do with filing the petition. Filing is required by Section 5. Service is provided for in Section 6. This latter section refers to the petition "*filed* under Section 5", to service on the district attorney "in the district wherein the suit is *brought*" and to filing an affidavit with the clerk of the court "wherein suit is *instituted*" (Italics supplied). If any inference is to be drawn from this language, it would seem to be that at the time service, mailing and filing of an affidavit occur the suit has already been brought and instituted. Moreover, this latter section provides not merely for steps to be taken by the plaintiff, but for the steps to be taken by the Government by way of answer, counterclaim and the like, and for the further prosecution of the suit and entry of judgment in the event that the Government neglects or refuses to answer. It seems evident that this section cannot reasonably be construed as purporting to define the steps preliminary to the beginning of the suit, or as laying down a different rule than the normal one, that the first step marks the beginning of the suit.

We submit, therefore, that taking the language of the various statutes of limitations in its ordinary and accepted sense, the action is begun when the petition is filed. This should control unless there are persuasive reasons for reaching the contrary conclusion. We have shown that the language of the Tucker Act itself furnishes no such reason.

We shall endeavor to show that there are no other such reasons, and that, on the contrary, other settled principles of statutory interpretation support our contention.

II

IN THE ABSENCE OF EXPRESS STATUTORY PROVISION IT MUST BE ASSUMED THAT CONGRESS INTENDED NO DEPARTURE FROM THE USUAL RULES GOVERNING THE COMMENCEMENT OF ACTIONS, AS ESTABLISHED BY COMMON LAW AND OTHER PRECEDENTS. THESE DO NOT REQUIRE THAT SERVICE BE EFFECTED BEFORE THE STATUTE OF LIMITATIONS HAS RUN.

It is an established rule of statutory interpretation that all acts of Congress must be read in the light of the common law, from which our system of jurisprudence is derived. *United States* v. *Sanges,* 144 U. S. 310. Moreover, language having an accepted meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. *Kepner* v. *United States,* 195 U.S. 100. Accordingly, since Congress has failed to define the bringing or beginning of a suit, within the meaning of the statutes of limitations governing suits under the Tucker Act, it must be presumed to have intended that the words "brought" and "begun" be taken in their judicially accepted sense, if that differs from common usage.

The common law rule as to what constitutes the beginning of an action, for the purposes of statutes of limitations, is correctly stated on page 7 of the Government's Brief in Opposition as follows:

> "Under the common law both in England and in this country, actions were commenced by the issuance of a writ with a bona fide in-

> tention to make service thereof (Angell on Limitations, 6th Edition, Sections 311, 312, 318). . . ."

See *Brown* v. *Babbington,* 2 Ld. Raymond 880; *Parsons* v. *King,* 7 Term Rep. 6; Wood on Limitations (4th Edition), Sec. 289.

The issuance of a writ being the first step in the proceedings, the action was deemed to have been commenced when that step was taken.

The same rule appears to have been followed in most of our states in the absence of express statutory provisions. Although in some cases it has been considered that the writ is not "issued" until placed in the hands of an officer for service (see *United States* v. *Northern Finance Corp.* 16 F. (2d) 998, 999 (C.C.A. 2d); *Bradford Estate Co.* v. *Brown,* 52 R.I. 103), it has commonly been held that the date on which the writ is made out, and not the date on which it is delivered for service, is *prima facie* the date of the commencement of the suit. Such, for example, is the rule in Massachusetts, *Gardner* v. *Webber,* 17 Pick. 407; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; in New Hampshire, *Mason* v. *Cheney,* 47 N.H. 24; *Anderson* v. *Aetna Life Ins. Co.,* 75 N.H. 375; in Maine, *Johnson* v. *Farwell,* 7 Greenleaf 370; *Biddeford Savings Bank* v. *Mosher,* 79 Me. 242; and in Vermont, *Day* v. *Lamb,* 7 Vt. 426; *Tracy* v. *Grand Trunk Ry. Co.,* 76 Vt. 313. In other jurisdictions, such as Pennsylvania, where the writ is not made out by the plaintiff himself, but is issued upon the filing of a praecipe, the action is deemed commenced when the praecipe is filed. *Gibson* v. *Pittsburgh Transpor-*

tation Co., 311 Pa. 312; *Ledonne* v. *Commerce Ins. Co.* 307 Pa. 1.

In equity we find the same principle applied, doubtless by analogy to the common law rule. The proceeding is deemed to be begun when the first formal step is taken, and not only after service has been had. The equity rule is succinctly stated in *Mound City Co.* v. *Castleman*, 187 Fed. 921 (C.C.A. 8th) at 925:

> "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process".

Such has long been the rule in England, since it was provided in 4 Anne, c. 16, Sec. 22 that the bill must be filed before process will issue. *Coppin* v. *Gray*, 1 Y. & C. 205; see also *Purcell* v. *Blennerhasset*, 3 Jo. & Lat. 24. And it is now firmly established in the federal courts in this country. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51; *United States* v. *Hardy*, 74 F. (2d) 841 (C.C.A. 4th); *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, 184 Fed. 199 (C.C.A. 8th); *Equitable Life Assurance Society* v. *Schwartz*, 42 F. (2d) 646 (C.C.A. 5th); *Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co.*, 21 F. (2d) 589 (W.D.N.Y.): *Humane Bit Co.* v. *Barnet*, 117 Fed. 316 (C.C.D.N.J.). While it is sometimes broadly stated that not only must the bill be filed, but the subpoena must also be lodged with the proper officer for service (see *United States* v. *American Lumber Co.*, 85 Fed. 827 (C.C.A. 9th);

United States v. *Miller,* 164 Fed. 444 (C.C.D. Ore.); *United States* v. *Northern Finance Corp.,* 16 F. (2d) 998, 999 (C.C.A. (2d)), it has been held in the cases in which the point has squarely arisen for decision that the mere filing of the bill stops the running of the statute. *United States* v. *Hardy, supra; Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co., supra;* cf. *Armstrong Cork Co.* v. *Merchants' Refrigerating Co., supra.* And the cases all agree that the suit is commenced at a point short of service of the subpoena.

Whether a proceeding be at law or in equity, the normal rule is, therefore, that it is commenced, at least so far as the statute of limitations is concerned, before the defendant has been served and had notice of the suit. And the same rule has been incorporated into the statutes governing procedure in many of the Code states. See *Domenech* v. *Verges,* 69 F. (2d) 714, 717 (C.C.A. 1st); *Nash* v. *El Dorado County,* 24 Fed. 252 (C.C.D. Cal.). This principle is, of course, subject to the proviso that the plaintiff must have had a *bona fide* intention to prosecute his suit diligently and must in fact have procured service on the defendant within a reasonable time after the first step in the proceeding has been taken. Failure to effect service within a reasonable time will be taken as evidence of lack of good faith in suing out the writ or filing the bill (see *Pierce* v. *Tiernan,* 280 Mass. 180, 181), but if the action is diligently prosecuted, it dates from the time the writ is issued or the bill filed.

There is a close analogy between the procedure defined in Sections 5 and 6 of the Tucker Act and the procedure in equity cases. Both involve the

filing of a bill or petition before it is served on the defendant. It is clear that in equity neither the bill nor the subpoena need be served before the period of limitations has run. No reason appears why the petition under the Tucker Act should be served within the statutory period.

While the Tucker Act does not expressly provide for the issuance of a writ or summons, there is an analogy between the filing of a petition under that Act, where the statutory procedure is exclusively followed, and the issuance of a writ at common law, in that the filing of the petition, like the suing out of the writ, is the first formal step taken by the plaintiff.[1] The filing of the petition is, perhaps, the more significant since it places on record the nature of the claim.

The statutory provisions relating to actions brought in the Court of Claims lend cumulative support to our contention that the filing of the petition, when that is the first act performed by the plaintiff, should be regarded as the beginning of a suit under the Tucker Act. The jurisdiction of district courts under that Act is concurrent with that of the Court of Claims. See Section 24 (20) of the Judicial Code (*infra*, p. 30). Except for a limitation as to the amount in controversy, and special jurisdictional statutes governing particular classes of cases, a claimant may bring suit in either court.

Section 1069 of the Revised Statutes, which antedated the Tucker Act, provided that a petition in

[1] The Court of Claims has held that a petition filed in that court performs the functions of both declaration and process, and the same would appear to be true of petitions filed under the Tucker Act. *Duran* v. *United States*, 31 C. Cls. 353, 358.

the Court of Claims must be filed within six years after the claim first accrued. The Tucker Act, which applied to both the Court of Claims and the district courts, provided in Section 1 (24 Stat. 505) that no suit against the United States should be allowed under that act unless "brought" within six years after the right accrued. Reading that section in the light of Section 1069, it is clear that suit in the Court of Claims was regarded by Congress as "brought" when the petition was filed. And that is clearly the rule today. Section 156 of the Judicial Code (U.S.C., Title 28, Sec. 262). It is difficult to perceive any reason why Congress should desire statutes of limitations on suits against the Government to operate differently depending on the court in which suit is instituted. See *Greathouse* v. *United States*, 166 U. S. 601, 606.

We are unable to find any logical explanation for the statement of the court below that an action of this character is not begun until a copy of the petition is served on the United States Attorney. The statutes do not require that interpretation. Such inferences as may be drawn from them indicate otherwise. In common parlance a suit is begun when the first formal act is performed. Neither at common law nor in equity is service deemed essential to the commencement of an action. And federal statutes governing other kinds of proceedings in which the filing of a petition is the first step make it clear that in those proceedings the action is commenced when the petition is filed.[2] We submit that the statutes of limitations

[2] Compare Section 1 of the Bankruptcy Act of 1898, as amended (U.S.C., Title 11, Section 1), where Congress expressly provided that the filing of a petition in bankruptcy marks the commencement of the proceedings.

in question must be interpreted in the light of these authorities. There are no grounds for assuming that Congress intended to lay down a new and different rule.

III

THE ARGUMENTS ADVANCED BY THE GOVERNMENT IN SUPPORT OF ITS CONTENTION THAT A SUIT UNDER THE TUCKER ACT IS NOT "BROUGHT" UNTIL A COPY OF THE PETITION HAS BEEN SERVED ON THE UNITED STATES ATTORNEY ARE UNSOUND.

A.

In its Brief in Opposition to the petition for certiorari (p. 6) the Government asserts that the "decision" of the court below to the effect that "at least" the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period finds support in the rule that, when the United States consents to be sued, the conditions of such consent must be strictly observed. That rule is, of course, a familiar one. We submit, however, that the attempt to invoke it as determinative of the instant question involves fallacious reasoning.

Conceding, for the purposes of argument, that a claimant suing the United States under the Tucker Act must comply with all the requirements of that Act, the question still remains as to when such compliance must take place. Even if we admit that there must be strict compliance, it does not follow that *all* of the prescribed steps must be taken before the period of limitations has run. Nor does it follow that any one of the steps subsequent to the

first step of filing the petition must be taken within the limitation period. The argument of strict compliance is of no assistance in determining the question as to what marks the beginning of the suit.

Moreover, if the Government's argument were sound, it would be necessary to hold that *all* of the requirements of Section 5 and 6 of the Tucker Act must be satisfied within the statutory period. But the Government does not follow the argument to its logical conclusion, and the courts have likewise declined to do so. The court below said that in its opinion there must "at least" be service on the United States Attorney, but did not suggest that a copy of the petition must be mailed to the Attorney General and an affidavit of service filed in order to commence the suit. Yet these latter requirements are contained in the same section and in the same sentence of that section as the requirement for service, and appear to be equally mandatory. No reason is suggested why one of the requirements of Section 6 must be met and the others may be disregarded. The Government, in its Brief in Opposition (p. 6), follows the language of the court below. There is a suggestion at page 7 that the plaintiff must mail a copy of his petition to the Attorney General before the statute has run, but it is nowhere suggested that the affidavit of service must also be filed before that time.

We have found no decision which follows the Government's argument to its logical conclusion. On the contrary, it has been held by several of the lower federal courts that the mailing of a copy of the petition to the Attorney General and the filing of an affidavit of service are not mandatory

but may be waived, or complied with—if insisted upon—after the proceedings have been commenced. *Little* v. *United States,* 54 F. (2d) 711 (W.D. La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M.D., N.C.); *Irving Trust Co.* v. *United States* (S.D. N.Y.) not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9600; *Jones* v. *United States,* (N.D.Ohio) not officially reported, but found in 1936 C. C. H. Federal Tax Service, Vol. 4, par. 9072; *Hostetter* v. *United States* (W. D. Pa.) not officially reported, but found in 1937 C. C. H. Federal Tax Service, Vol. 4, par. 9436. The question of limitations was squarely before the court in the *Irving Trust Co.* case, *supra,* and appears to have been involved in the *Wilhelm* case, *supra,* although not clearly referred to in the opinion. See also, *United States* v. *Hvoslef,* 237 U. S. 1, and *Griffin's Case,* 13 C. Cls. 257. In the latter case the Court of Claims held that the plaintiff's failure to verify his petition, as required by Section 159 of the Judicial Code (U. S. C., Title 28, Sec. 265), which is similar in this respect to Section 5 of the Tucker Act, is a mere procedural defect which may be cured even after the statute of limitations has run.

These decisions support our contention that the principle requiring strict compliance with the conditions imposed upon suits against the Sovereign is irrelevant to the question of what constitutes the beginning of such a suit for the purposes of statutes of limitations. So far as the terms of the Tucker Act are concerned, each procedural step prescribed is of equal dignity with every other step. The principle of strict compliance does not war-

rant the singling out of any one or more of those steps as marking the commencement of the suit. If such an interpretation of the act is to be justified, it must be on some other grounds.

B.

It may be suggested that compliance with all of the requirements of Sections 5 and 6 of the Tucker Act is a prerequisite to the vesting of jurisdiction in the court, and that the statute of limitations is not satisfied until jurisdiction has vested. But the authorities just cited, *supra,* p. 22, show that the court may acquire jurisdiction even though there has not been strict compliance with Sections 5 and 6. Moreover, the acquisition of personal jurisdiction by service on the defendant is not normally regarded as essential to the commencement of an action. *United States* v. *Chase Securities Corp.,* 24 F. (2d) 500 (C.C.A. 1st); *Taylor* v. *Southern Ry. Co.,* 6 F. Supp. 259 (E. D. Ill.); *Schroeder* v. *Merchants' & Mechanics' Insurance Co.,* 104 Ill. 71; *Vincent* v. *McElvain,* 304 Ill. 160. Cf. *Domenech* v. *Verges,* 69 F. (2d) 714 (C.C.A. 1st).

The jurisdictional character of the statute of limitations itself is, we submit, wholly irrelevant. True, the court would be without jurisdiction if the bar of the statute had fallen, but the very question at issue is whether it has fallen.

IV

THE QUESTION IS NOT SETTLED BY AUTHORITY. THE CASES RELIED ON ARE NOT PERSUASIVE NOR DETERMINATIVE OF THE ISSUE.

As the court below observed, the authorities on the question of how and when a suit under the Tucker Act is commenced "are in some confusion". *Munro* v. *United States,* 89 F. (2d) 614, 616. Most of the cases dealing with that broad issue have turned on the question whether the procedure defined in Sections 5 and 6 of the Tucker Act is exclusive or whether the Conformity Act permits the adoption of local practice in suits against the United States. On that point there is a diversity of opinion among the lower courts, which the decision in the instant case will doubtless resolve. The confusion on this issue, however, has been carried over into the question presented by the *Bates* case—whether, if the procedure outlined in the Tucker Act is followed, there must be service in addition to filing the petition to avoid the bar of the statute of limitations. The confused and, we submit, fallacious reasoning in cases involving this latter question has been due in large measure to the tendency of the courts to treat authorities holding the Conformity Act inapplicable to suits against the United States as controlling. Authorities on the one point are commonly cited as authorities on the other. No court seems carefully to have analyzed the question. The result has been the development of a body of dicta, which, we submit, were ill considered, to the effect that service of a copy of the petition is essential to the commencement of a suit for the purposes of the

statute of limitations. Yet the cases in which the question was actually raised for decision are few in number and are themselves based on differing theories and rest on authorities dealing with other issues.

One of the cases most commonly relied upon as authority for the proposition that service of a copy of the petition must be made within the statutory period is *Reid Wrecking Company* v. *United States,* 202 Fed. 314 (N.D. Ohio). But in that case the statute of limitations does not appear to have been in any way involved. The sole point raised was whether monitions should be quashed in admiralty proceedings on the ground that the proceedings were not brought "in the district where the plaintiff resides", as required by Section 5 of the Tucker Act, the point having been timely raised by the Government.

In addition to the *Reid* case, a group of cases involving the application of the Conformity Act are often treated as controlling authorities. In *National Casket Company* v. *United States,* 263 Fed. 246 (S.D. N.Y.) and *Cassarello* v. *United States,* 265 Fed. 326 (N.D. Pa.) motions to quash service of summons, made in accordance with local practice, were granted on the ground that local practice was inapplicable. The courts had no occasion to, and did not, discuss which of the procedural steps prescribed by the Tucker Act mark the beginning of the suit for purposes of the statute of limitations. The same point was all that was raised in *Miller* v. *United States,* 11 F. Supp. 924 (W.D.N.Y.), where the service was similarly

quashed. The court did express the opinion that service of a copy of the petition should mark the commencement of the suit, but that was not necessary to the decision. In *Henry* v. *United States,* 15 F. Supp. 651 (M.D.Pa.) the question involved was the same as that in the instant case. Like the court below, the court in that case stated that the time of service of the petition determines when the action is commenced, a statement which, we submit, was an unnecessary dictum.

A case touching somewhat upon the problem and relied upon by the District Court in the *Bates Manufacturing Company* case is *Spencer* v. *United States,* 14 F. Supp. 46 (D. Mass.). There it was held that an action against the United States was not commenced by the mere signing and verification of a petition. The plaintiff in that case had died before the petition was filed, and the action was held to have abated with his death. Although the court stated that the federal courts had uniformly held that suit against the Government is not begun until the petition is served upon the United States Attorney, that question was obviously not in issue.

We have found only three cases in which that question was squarely presented for decision.[3] The first of these cases is *Creasy* v. *United States,* 4 F. Supp. 175 (W.D. Va.), where it was held that the filing of a petition did not satisfy the statutes of limitations applicable to suits on policies of war risk insurance, when service was not effected until two days after the period had run. The reason-

[3] We do not include here the decision of the Circuit Court of Appeals in the *Bates Manufacturing Company* case.

ing of the opinion, we submit, is reflected in the following three quotations (p. 179):

1. "It is provided in title 38, §445, U.S.C., 38 USCA §445 (by reference to title 28, §763), that suit shall be begun by causing a copy of the petition to be served upon the district attorney of the United States in the district where suit is brought, and causing an affidavit of such service to be filed with the clerk of the court."

2. "It has been held (Reid Wrecking Co. v. U.S. (D.C.) 202 F. at page 317) that the requirement of service upon the district attorney is mandatory; that, suits against the United States being solely by its permission, the procedure prescribed in the grant of such permission must be literally followed, and that courts cannot permit deviation from the letter of such consent."

3. "In my opinion, the filing in the clerk's office on May 11th of a copy of the petition does not affect the situation. The statute provides that what shall be filed with the clerk is an affidavit showing service of the petition on the district attorney."

It is to be observed that the court completely ignores Section 762 of title 28, which is also referred to in Section 445 of title 38, and which, when read in conjunction with Section 763, requires the filing of a verified petition before a copy of such petition is served on the United States Attorney. Moreover, we submit that the first excerpt quoted above from its opinion is wholly inaccurate and completely begs the question. Nowhere in Section 763 is there a provision that "suit shall be begun

by causing a copy of the petition to be served upon the district attorney".

The second case is *Walton* v. *United States,* 73 F. (2d) 15 (C.C.A. 8th). There a petition was filed in time, but no service was made until after the statutory period had expired. The court not only held that there was no express provision in the Tucker Act defining the beginning of a suit, but found no implication in the language of the Act in regard to that question, for it concluded that in the absence of a controlling act of Congress the question must be determined by the local law. Since the local statute provided that a civil action was commenced by service of a summons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney.

The third case is *Bachmann, Emmerich & Co. Inc.* v. *United States* (S.D.N.Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. That was a tax refund suit, in which the petition was seasonably filed but not served until a few days after the statute had run. The court granted a motion to dismiss, on the theory, which we have urged is erroneous, that since there must be strict compliance with the statutory provisions all of the requirements of Sections 5 and 6 of the Tucker Act must be met before the suit can be regarded as commenced, relying on the *Reid Wrecking Co., Creasy, National Casket Co.,* and *Cassarello* cases, all of which we have discussed above.

The foregoing review of the decisions amply confirms the statement of the court below in the in-

stant case as to the confused state of the authorities. Agreement among them is found, however, on one point, namely that no statute expressly defines what shall constitute the commencement of a suit against the United States in the district courts. We submit that none of the decisions contain clear or logical expositions of the reasons for holding that service of a copy of the petition marks the beginning of the suit for purposes of the statute of limitations.

With one Circuit Court of Appeals holding that local statutes determine the time of commencement of a suit against the United States, and two district courts proceeding on the strict compliance theory, it is evident that the law is far from settled. Dicta in other cases involving the applicability of the Conformity Act do not clarify the problem. It is submitted that the question merits and requires careful re-examination at such time as it may properly come before this Court.

Respectfully submitted,

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APPENDIX

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 24 of the Judicial Code, as amended (U.S.C., Title 28, Sec. 41), derived from Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505:

"SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * * * *

"Twentieth. Concurrent with the Court of Claims, * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * * * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * "

* * * * * * * *

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506 (U.S.C., Title 28, Secs. 762 and 763):

"SEC. 5. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

"SEC. 6. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and

shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. . . . ."

SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1937.

Leo N. Munro, Petitioner, vs. The United States of America. } On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 31, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Certiorari was granted because of conflicting views in the lower courts.

Claiming to be permanently and totally disabled, petitioner instituted an action in the United States District Court, Western District of New York, to recover under a War Risk Insurance Policy. He was honorably discharged in 1919.

Before the cause came on for trial respondents moved for dismissal because the action was not brought within the time prescribed by Sec. 19, World War Veterans Act 1924, as amended by Act July 3, 1930, 46 Stat. 992, copied in the margin.[1] This motion was overruled. Whether properly so, is the matter for our consideration.

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[1] Act of July 3, 1930, c. 849, 46 Stat. 992.

Sec. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 5 and 6 of the Act entitled 'An Act to provide for the bringing of suits against the Government of the United States,' approved March 3, 1887, and section 10 thereof so far as applicable. . . .

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made; Provided, that for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this

By concession it was necessary to bring suit not later than July 1, 1933.

March 16, 1933, a praecipe for issuance of summons was filed wtih the Clerk of the District Court; on the same day copy of the summons was served upon the United States Attorney in Buffalo and another mailed to the Attorney General at Washington; no copy of the complaint was served upon the United States Attorney until July 26, 1933; the original complaint was not filed with the Clerk until April 23, 1936.

February 15, 1934, the United States Attorney filed an answer without questioning the timeliness of the suit; a year later he moved to dismiss. The cause was heard in April, 1936; judgment went for the assured July 29, 1936.

In following the above described procedure petitioner's counsel acted upon information given by the Assistant United States Attorney, who declared that service of summons would suffice to give jurisdiction and toll the statute; that complaint might be served thereafter.

Two points are presented. Did procuring the summons, serving one copy on the United States Attorney and sending another to the Attorney General begin the suit within the requirement of the

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limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. . . .

Tucker Act, March 3, 1887.

Sec. 5 (U. S. C. A., Title 28, Sec. 762).

Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Sec. 6 (U. S. C. A., Title 28, Sec. 763).

Service; appearance by district attorney: The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, . . .

statute? If not, do the circumstances establish waiver of the defense that suit was out of time.

Section 19, Act of 1924, permits an action on a War Risk policy to be brought in the United States District Court for the district in which the claimant resides. Also directs, "The procedure in such suits shall be the same as that provided in Sections 5 and 6" (Sections 762 and 763, Title 28, U. S. C. A.) of the Tucker Act of March 3, 1887, "and Section 10 thereof [Sec. 765, Title 28, U. S. C. A.] insofar as applicable." Sec. 5 of the Tucker Act provides that the plaintiff "shall file a petition" with the Clerk of the court containing a succinct statement of the facts upon which the claim is based; Sec. 6 that he shall cause one copy of this to be served upon the District Attorney and mail another to the Attorney General. These requirements were not complied with prior to July 1, 1933.

The Circuit Court of Appeals held the suit was not brought in time to toll the statute, and with this conclusion we agree. The opinion there adequately refers to the sundry opinions which have considered the subject, discloses the claims of the parties and reasons for the judgment.

Affirmation here, upon authority of *United States* v. *Larkin*, 208 U. S. 333, of the District Court's judgment in *United States* v. *Mill Creek, etc.*, and two similar causes (Nos. 103, 104, 105, Oct. Term 1919,) 251 U. S. 539, cannot properly be regarded as authority for a view contrary to the one we now approve. Those causes came up under a statute which permitted direct appeals from District Courts solely upon questions of jurisdiction. We determined only that the District Court had power to hear and rule upon the questions presented to it—among them whether the suits were brought in time. The merits of the controversy—whether in reality the suits were in time—we did not consider. Examination of the opinion in Larkin's case and the statute then in force will make this clear enough.

Suits against the United States can be manitained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reid* v. *United States*, 211 U. S. 529, 538. The Conformity Act cannot be relied upon to change any of these.

The District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States. *Finn* v. *United States,* 123 U. S. 227, 233. Judgment against them is not permissible if first sought after expiration of the time allowed.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.